(5)

Supreme Court, U.S.
FILED
FEB 12 2003
OFFICE OF THE CLERK

No. 02-638

In the

Supreme Court of the United States

AGENCIA LA ESPERANZA CORPORATION, INC.,

Petitioner,

v.

ORANGE COUNTY BOARD OF SUPERVISORS and ORANGE COUNTY PUBLIC FACILITIES AND RESOURCES DEPARTMENT,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES S. BURLING
MERIEM L. HUBBARD
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioner Agencia La Esperanza Corporation, Inc.

13pp

QUESTION PRESENTED

May a local government avoid the "rough proportionality" test of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by imposing development exactions (including "impact" fees) by legislative enactment?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI 1

INTRODUCTION 1

ARGUMENT 1

I. DEVELOPMENT FEES RECEIVE THE SAME CONSTITUTIONAL PROTECTION AFFORDED OTHER KINDS OF EXACTIONS 1

II. THE APPLICATION OF *DOLAN*'S STANDARD OF "ROUGH PROPORTIONALITY" CANNOT DEPEND ON WHETHER AN EXACTION IS IMPOSED BY LEGISLATIVE OR ADJUDICATIVE GOVERNMENT ACTION 4

III. *DOLAN*'S "ROUGH PROPORTIONALITY" TEST SETS A CONSTITUTIONAL FLOOR, BELOW WHICH EACH INDIVIDUAL STATES' PROTECTION OF PROPERTY RIGHTS MUST NOT FALL 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

Cases

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 3

City of Portsmouth New Hampshire v. Schlesinger, 57 F.3d 12 (1st Cir. 1995) 4

Dolan v. City of Tigard, 512 U.S. 374 (1994) 1-2, 5-7

Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996) 3

Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek, 729 N.E.2d 349 (Ohio 2000) 6-7

Manocherian v. Lenox Hill Hospital, 643 N.E.2d 479 (N.Y. 1994) 4

National Association of Home Builders v. Chesterfield County, 907 F. Supp. 166 (E.D. Va. 1995), *aff'd*, 1996 U.S. App. LEXIS 18838 (4th Cir. July 30, 1996) 4

Northern Illinois Home Builders Association, Inc. v. County of Du Page, 649 N.E.2d 384 (Ill. 1995) 6-7

Trimen Development Co. v. Kings County, 877 P.2d 187 (Wash. 1994) 6-7

Village of Norwood v. Baker, 172 U.S. 269 (1898) 2

Miscellaneous

Reznik, Inna, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242 (2000) 4-5

TABLE OF AUTHORITIES—Continued

Page

Eagle, Steven J., *Symposium: When Does Retroactivity Cross the Line?:* Winstar, Eastern Enterprises *and Beyond: Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 Ala. L. Rev. 977 (2000) 3-4

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Agencia La Esperanza Corporation, Inc. (Esperanza), respectfully files this reply to the opposition to Petition for Writ of Certiorari (Opp.).

INTRODUCTION

Respondents Orange County Board of Supervisors and Orange County Public Facilities and Resources Department do not deny that this case presents an important question of federal regulatory takings law. Instead, Respondents claim that there is no conflict among the lower federal and state courts regarding the applicability of *Dolan*'s "rough proportionality" test to development exactions imposed by legislative enactment. That position is not supported by legal scholars (*see, e.g.*, Petition for Writ of Certiorari (Petition) at 6), or by the arguments presented in Respondents' opposition to Esperanza's petition for writ of certiorari.

ARGUMENT

I

DEVELOPMENT FEES RECEIVE THE SAME CONSTITUTIONAL PROTECTION AFFORDED OTHER KINDS OF EXACTIONS

Respondents argue that "the *Dolan* test would not apply to a development fee." Opp. at 6. But there is nothing in this Court's jurisprudence to lend credence to that assertion. All but one of the cases relied on by the *Dolan* majority in formulating the "rough proportionality" test involved municipal ordinances—legislation of general applicability—requiring developers to dedicate property or cash to help finance the construction of public facilities. *See Dolan v. City of Tigard*, 512 U.S. 374, 400 (1994) (Stevens, J., dissenting). "In assessing the legality of the conditions, the courts gave no

indication that the transfer of an interest in reality was any more objectionable than a cash payment." *Id.*

In the early case of *Village of Norwood v. Baker*, 172 U.S. 269 (1898), this Court treated the taking of property in the form of fees the same as the taking of property in the form of land. The Village of Norwood condemned a strip of land through the center of a single parcel for the purpose of constructing a road, and then assessed the owner for the full costs of the condemnation. The owner sued, contending that the assessment was not in proportion to any benefits received by her; rather, the condemnation was intended to connect two roads abutting her property for public convenience. This Court agreed, and wrote:

> It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and, therefore, should specially contribute to the cost incurred by the public. *It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum, representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made, or is about to be made, that the sum so fixed is in excess of the benefits received.*
>
> In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation."

172 U.S. at 279 (emphasis added).

Respondents claim that language from this Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), precludes the application of *Dolan* to a development fee. Opp. at 5-6. But that case did not address the issue of excessive exactions. In *City of Monterey v. Del Monte Dunes*, this Court questioned the extension of *Dolan*'s rough proportionality test to permit denials. Rough proportionality is an unhelpful standard when addressing a permit denial. In *Dolan*, as in this case, the standard made sense: the City there could calculate the traffic impact created by Mrs. Dolan's enlarged store and it could assess the proportionate amount by which a bicycle trail could reduce the impact. But such an approach is not helpful in assessing whether a permit denial fails to substantially advance a legitimate governmental interest—after all, it is difficult to determine whether a permit denial is roughly proportional to anything. As this Court said, the proportionality standard "was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is *based not on excessive exactions* but on denial of development." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. at 703 (emphasis added).

This Court's decision in *City of Monterey* did nothing to erase the conflict in the state and lower federal courts over the appropriate standard of review applied to exactions imposed as a condition of a development permit. *See* Steven J. Eagle, *Symposium: When Does Retroactivity Cross the Line?:* Winstar, Eastern Enterprises *and Beyond: Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 Ala. L. Rev. 977, 1042 (2000).

The lower court in this case noted that even the California Supreme Court, in *Ehrlich v. City of Culver City*, 911 P.2d 429, 439 (Cal. 1996), did not distinguish between the physical taking and the imposition of fees. Appendix at A-4. Indeed, there is

no constitutional basis for making such a distinction. *See* Petition at 17.

II

THE APPLICATION OF *DOLAN*'S STANDARD OF "ROUGH PROPORTIONALITY" CANNOT DEPEND ON WHETHER AN EXACTION IS IMPOSED BY LEGISLATIVE OR ADJUDICATIVE GOVERNMENT ACTION

Respondents try to dispense with any conflict among the lower federal and state courts by recasting several of the cases that apply *Dolan* to legislatively imposed exactions as cases that really involve adjudicatively imposed exactions.[1] By so doing, Respondents highlight a major source of confusion plaguing the lower federal and state courts, and another reason this Court should accept this case for review to provide much needed guidance on the application of *Dolan*.

The legislative/adjudicative distinction is not a viable means for determining whether or not to apply *Dolan*'s "rough proportionality" standard because it is difficult to pigeonhole local government action as legislative, administrative, or judicial. Local governments are not structured under strict separation of powers principles, and commonly combine these functions in land use decisionmaking. *See* Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 257-61 (2000). *See also* Eagle, *supra*, at 1042 (The problem of discerning which statutes are legislative and which are adjudicative for

---

[1] *See* discussions of *City of Portsmouth New Hampshire v. Schlesinger*, 57 F.3d 12 (1st Cir. 1995), Petition at 10, Opp. at 12; *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), Petition at 8-9, Opp. at 11; and *National Association of Home Builders v. Chesterfield County*, 907 F. Supp. 166 (E.D. Va. 1995), *aff'd*, 1996 U.S. App. LEXIS 18838 (4th Cir. July 30, 1996), Petition at 9-10, Opp. at 8.

purposes of a *Dolan* analysis is apt to be open-ended and chronic.).

Both *Nollan* and *Dolan* involved a mixture of legislative and adjudicative government action. *See* Petition at 17-18. And Justice Souter took the position that the *Dolan* majority mischarcterized the case "as involving an 'adjudicative decision' to impose permit conditions, but the permit conditions were imposed pursuant to Tigard's Community Development Code." *Dolan*, 512 U.S. at 413 (citation omitted) (Souter, J., dissenting). Thus, Justice Souter concluded, the only "adjudication" involved whether to grant a variance from the permit conditions.

Inna Reznik authored the most comprehensive article on the problems encountered when differentiating between legislative and adjudicative decisions in land use cases. *See* Reznik, *supra*. In the article Ms. Reznik describes the results of a survey of 29 cases. She put each case into one of three categories: (1) scheduled exactions (where an amount of money or land was specified in advance by a legislative body); (2) negotiated (authorized by a legislative body but individually determined in response to a specific development proposal; or (3) not clear. *Id.* at 252. The results show a great deal of confusion among the courts, and an inconsistent application of the legislative/adjudicative distinction.

Of the cases involving exactions that were scheduled by the legislative body (those closest to legislative decisions), just as many courts applied *Dolan*'s "rough proportionality" test as refused to apply it because of the belief that *Dolan* applies only to adjudicative decisions. Reznik, *supra*, at 254. In challenges to negotiated exactions (those closest to adjudicative decisions), five out of nine applied *Dolan*'s "rough proportionality" standard. *Id.* at 255. And finally, in nine cases where the court did not clarify the nature of the exaction, eight out of nine applied the "rough proportionality" standard. *Id.* at 256.

Respondents cannot explain away the conflict among the lower federal and state courts by characterizing every case as involving adjudicative instead of legislative action.

III

DOLAN'S "ROUGH PROPORTIONALITY" TEST SETS A CONSTITUTIONAL FLOOR, BELOW WHICH EACH INDIVIDUAL STATES' PROTECTION OF PROPERTY RIGHTS MUST NOT FALL

Among the cases cited by Petitioner as applying *Dolan*'s standard of "rough proportionality" to legislatively imposed exactions are cases from Washington, Illinois, and Ohio.[2] Respondents' claim that these cases do not present conflicts because they appear to apply state law analysis. Opp. at 12-14. In fact, in each of the cases, the court examined the standard articulated in *Dolan* and concluded that the federal constitutional floor of protection was met.

In *Dolan*, this Court decided how close the connection must be between a required dedication and the proposed development in order to be constitutionally sufficient to justify conditions imposed on a building permit. 512 U.S. at 389. This Court examined "representative decisions" of the state courts and found that the levels of scrutiny adopted in those decisions ranged from "very generalized statements as to the necessary connection" to "a very exacting correspondence." *Id.* at 389-90. This Court concluded that the "intermediate position," adopted by a majority of the states and based on some form of the reasonable relationship test, "is closer to the

---

[2] *Trimen Development Co. v. Kings County*, 877 P.2d 187 (Wash. 1994) (*see* Petition at 9); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995) (*see* Petition at 7-8); and *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000) (*see* Petition at 7).

federal constitutional norm than [the other two tests]." *Id.* at 391.

Trimen Development Co. and *Home Builders Association of Dayton* both involved forms of the "reasonable relationship" test falling within the middle level of scrutiny adopted by this Court in *Dolan* as the constitutional norm. *Dolan*, 512 U.S. at 390-91. In *Trimen*, the court determined that the fees at issue were "reasonably necessary" as a direct result of the proposed development. *Trimen*, 877 P.2d at 194. *See* Petition at 9. In *Home Builders Association of Dayton*, the court adopted a dual rational basis test "based on the *Nollan* and *Dolan* cases" (729 N.E.2d at 356), and applied a "middle level of scrutiny" that considers whether there is a "reasonable connection" between needs and projected growth and between expenditures and benefits (*id.* at 355-56). *See* Petition at 7.

The court in *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384, examined this Court's takings jurisprudence to establish a minimum level of protection under the Takings Clause. *Id.* at 388-89. The court then applied the "specifically and uniquely attributable" standard described by this Court in *Dolan* as a more exacting standard of scrutiny than is required by the Federal Constitution (*Dolan*, 512 U.S. at 389-90). *See* Petition at 7-8.

The courts in these cases did not abandon the federal standard for their own state tests. The courts relied on this Court's constitutional takings decisions to determine that the state tests met or exceeded the federally established level of scrutiny—the "rough proportionality" test of *Dolan*.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, the Petition for Writ of Certiorari should be granted.

DATED: February, 2003.

Respectfully submitted,

JAMES S. BURLING
MERIEM L. HUBBARD
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioner Agencia La Esperanza Corporation, Inc.